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Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

L. W. ARMWOOD and MARY K.
ARMWOOD,

Appellants,

vs.

WM. A. FRANCIS, dba UNCLE
BILL'S DINNER BELL MO-
TEL AND CAFE,

Respondent.

FILED

MAR 27 1959

Clerk, Supreme Court, Utah

CASE
No. 9002

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT

We think appellant's statement is incorrect, and page 2 of Appellant's brief, it is stated that the judge directed defendant's counsel to file a motion to dismiss, referred to from the record as page 18. We find no such evidence in the record.

Pleadings were filed by the respective parties, and a pretrial hearing was had, at the conclusion of which, the court made a pretrial order as follows: (R. 16-17)

"2. The uncontroverted facts in the case are: that the plaintiffs, on the first day of September, 1957, went to the defendant's place of business at about 861 North Second West, and served themselves to certain food items at what is called the Smorgasboard, and then seated themselves at a table; the plaintiffs were colored people; later the police arrived, and after the police arrived, the defendant offered to serve the plaintiffs a meal at the defendant's expense. The plaintiffs did not make any request for lodging.

"3. The plaintiffs' allegations are that the plaintiffs presented themselves to be served with food, and the defendant's employees advised them that they could not be served. The plaintiffs ultimately left the establishment without completing their meal. The plaintiffs allege that the conduct of the defendant was in violation of 76-31-2, Utah Code Annotated, 1953.

"4. The defendant raises issues in this case, and they are stated as follows:

"(a) It is alleged by the defendant that the plaintiffs visited the Cafe of the defendant; that

they did not visit the motel, or any portion of the defendant's property that could be classified as an Inn, and that the type of business upon which they came, and the place where they presented themselves was for service that did not bring them within the Statute cited above, which refers to an innkeeper's responsibility;

"(b) The defendant denies that the plaintiffs were refused service, and denies that they were advised to leave, and further denies each allegation of plaintiffs' complaint, with reference to refusal to serve;

"(c) The defendant denies that the plaintiffs were abused in any way, or humiliated, and allege that they were invited to remain and eat without cost.

"5. The case was set for jury trial on the 11th day of December, 1958, at 10:00 o'clock A.M. IT WAS ORDERED THAT counsel for the parties convene with the Trial Court on said December 11, 1958, at 9:30 o'clock A.M. to discuss the issues to be tried.

"THE COURT: Does the pretrial order as dictated by the Court constitute a fair summary of the pretrial proceedings, Mr. Oliver?

"MR. OLIVER: I think so, yes.

"THE COURT: Mr. Welch?

"MR. WELCH: Yes, your Honor."

Under the discovery procedure, answers to plaintiffs' interrogatories, the following facts were established: (R. 10-11).

A license was issued for a motel and a license for a restaurant at 861 North 2nd West. However, the motel units were separate and apart from 861 North 2nd West and had no physical connection with them. Registration for the motel could be obtained at 861 North 2nd West, which was a restaurant. Actually no office was maintained. The cafe was located in a building at 861 North 2nd West, and the person who took payment from those who had eaten in the cafe, was available to take reservations from those who wished to register for rooms in the motel. No application was made for a modification of the pre-trial order.

PROPOSITION OF LAW

As a matter of law, did plaintiffs establish the relationship of innkeeper and guest by having dropped into defendant's restaurant for a meal, under the circumstances as appears from the record in this case?

ARGUMENT AND AUTHORITIES

The pretrial order definitely established that the plaintiffs did not make any request for lodging. The trial court was correct in dismissing plaintiffs' complaint. *Nance vs. Mayflower Tavern*, 106 Utah, 517, 150 Pac. (2d) 773.

The case of *Alpaugh vs. Wolverton*, (Virginia) 36 S. E. (2d) 906, discusses only one point, which is the identical and single principle involved in the instant case. Therefore, I quote the case in full:

“Charles W. Alpaugh, hereinafter called the plaintiff, filed in the court below a notice of motion for judgment in two counts against Earl B. Wolverton, hereinafter called the defendant.

“The first count alleges, in substance, that the defendant was the owner and operator of a ‘certain public hotel and restaurant,’ in the town of Manassas, Virginia, ‘for the reception, lodging and entertainment of the public in general’; that the defendant had entered into an ‘arrangement and agreement’ with the local Chamber of Commerce, under the provisions of which the defendant had agreed to furnish to the members of that organization ‘lunch, food and drink,’ on Tuesday of each week; and that although the plaintiff was

a member 'in good standing' of the Chamber of Commerce, and was known to the defendant to be such, and although the plaintiff tendered to the defendant the price of the meal, yet the defendant, in violation of his 'duties and obligations' to the plaintiff and in 'utter disregard of his rights,' 'wilfully, wickedly, wantonly and maliciously' refused to serve the plaintiff with food and drink on Tuesday, October 31, 1944, while he (the plaintiff) was 'seated at the dining table' in the hotel,' along with 'other members of the said Chamber of Commerce,' thereby maliciously humiliating him and bringing him into ridicule, disrespect and disgrace.'

"The second count is identical with the first, except that it alleges that the defendant had a similar 'arrangement and agreement with the Kiwanis Club of Manassas,' of which the plaintiff was a member 'in good standing,' under the terms of which the defendant was to serve dinner to the members of that club on each Friday evening, and that on Friday, November 10, 1944, the defendant had refused to serve the plaintiff along with the other members of the organization.

"The defendant filed a demurrer which, in substance, challenged the sufficiency of the notice of motion, and each count thereof, on the grounds

that, (1) it improperly combined a tort action with one arising out of a contract, and (2) it failed to allege that the defendant had violated any legal duty which he owed to the plaintiff. The lower court sustained the demurrer on the second ground, without passing on the first, and to review a judgment dismissing the notice of motion the present writ of error has been allowed.

“Since we are of opinion that the trial court was right in sustaining the second ground of demurrer, it is not necessary to inquire whether the first ground was likewise well taken.

“The notice of motion for judgment is not skilfully drawn. It is not clear from its allegations whether the plaintiff claims that the defendant’s failure and refusal to serve him was a breach of the ‘arrangement and agreement’ which the defendant had made with the two organizations, of which the plaintiff was a member, and for his benefit, or whether it was a breach of the legal common-law duty which the defendant, as the operator of the ‘public hotel and restaurant,’ owed to him (the plaintiff) as a member of the public. However, both in the written brief and in the oral argument before us, the plaintiff has proceeded under the latter theory, and to that we will address and confine our attention.

“The plaintiff insists that the allegations of the notice of motion for judgment are sufficient to show that in furnishing and agreeing to furnish the meals, under the circumstances stated, the defendant was a hotel operator or an innkeeper; that, as such, he ‘was not entitled to say whom he would serve and whom he would not so serve,’ but that ‘he was legally bound to entertain and serve each and every one requesting such service and entertainment,’ whether he be a local resident or a traveler from a distance.

“The defendant, on the other hand, insists that the allegations show that the relation established, or sought to be established, between the parties was not that of innkeeper and guest, but merely that of restaurateur and customer, and that under the latter relation there was no common-law duty on the part of the defendant to serve the plaintiff, or any other customer, with meals.

“In 28 Am. Jur., Innkeepers, § 46, p. 568, the author says: ‘an innkeeper holds out his house as a public place to which travelers may resort, and of course surrenders some of the rights which he would otherwise have over it. Holding it out as a place of accomodation for travelers, he cannot arbitrarily prohibit, persons who come under that character, in a proper manner, and at suitable

times, from entering, so long as he has the means of accomodation for them; nor can he arbitrarily refuse to continue to furnish a guest with proper acomodations.' See also, Cooley on Torts, 4th Ed., Vol. 3, § 462, pp. 280, 281; Jackson vs. Virginia Hot Springs Co., 4 Cir., 213 F. 969, 973; Talbott vs. Southern Seminary, 131 Va. 576, 579, 109 S.E. 440, 19 A.L.R. 534 (dictum).

"While some of the early cases seem to restrict the relation of guest of an innkeeper to one who comes from a distance, and to exclude a resident of the town in which the hotel or inn is situated, the modern cases place no such limitation on the relationship. Hence, a townsman or neighbor may be a guest at an inn, provided he is away from home and receives transient entertainment. 28 Am. Jur., Innkeepers, § 22, pp. 552, 553, and authorities there cited.

"Once the technical relation of innkeeper or hotelkeeper and guest has been established, the parties become subject to the duties, responsibilities and liabilities which attach to the relationship. Because of the quasi public nature of his business, the innkeeper must furnish proper accomodations in the way of lodging, food etc., so far as they are available. 43 C.J.S., Innkeepers, § 9, p. 1149. He becomes 'practically an insurer of

the safety of property intrusted to his care' by the guest (28 Am. Jur., Innkeepers, § 67, p. 585), and he incurs other responsibilities which need not be detailed here. In return he has a lien on the property of his guest for the reasonable charges of such keep and entertainment, both at common-law (28 Am. Jur., Innkeepers, § 123, p. 624) and under our statute (Code, § 6444.)

"A restaurant, on the other hand, is an establishment where meals and refreshments are served. 28 Am. Jur., Innkeepers, § 10, p. 545; 43 C.J.S., Innkeepers, § 1, subsec. b, p. 1132.

"The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is entitled to the privileges of the latter. 28 Am. Jur., Innkeepers, § 120, p. 623; 43 C.J.S., Innkeepers, § 20, subsec. b, p. 1169. His rights and responsibilities are more like those of a shopkeeper. *Davidson vs. Chinese Republic Restaurant Co.*, 201 Mich. 389, 167 N.W. 967, 969, L.R.A. 1918E, 704. He is under no common-law duty to serve everyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. *Nance vs. Mayflower Tavern, Inc.*, 106 Utah 517, 150 P. 2d 773, 776; *Noble vs. Higgins*, 95 Misc. 328, 158 N.Y.S. 867, 868.

“Everyone patronizing or seeking to patronize the facilities of a hotel or inn does not necessarily become a ‘guest’ of the establishment within the technical meaning of that term. It is well settled that the proprietor of a hotel may be a technical ‘innkeeper’ as to some of his patrons and a ‘boardinghouse keeper’ as to others. *Cooley on Torts*, 4th Ed., Vol. 3, § 462, pp. 281, 282; *Hancock vs. Rand*, 94 N.Y. 1, 46 Am. Rep. 112; *Cedar Rapids Investment Co. vs. Commodore Hotel Co.*, 205 Iowa 736, 218 N.W. 510, 511, 56 A.L.R. 1098. Or the relationship may be that of landlord and tenant. *Shorter vs. Shelton*, 183 Va. 819, 33 S.E. 2d 643; *Cedar Rapids Investment Co. vs. Commodore Hotel Co.*, *supra*.

“No one would seriously contend that a casual patron of a barbershop located in a hotel, or one who purchases a newspaper or cigar from a hotel newsstand, or one who uses the pay-telephone in the hotel lobby, by virtue of such patronage alone, thereby became a ‘guest’ of the hotel in a technical sense.

“And so, too, where a hotel operator operates a restaurant for the accommodation both of its guests and of the public in general, he may be an innkeeper as to some of his patrons and a restaurateur as to others. Clearly, one who goes into a

restaurant, to which the general public is invited, for a meal, should be entitled to no greater privileges and subject to no greater liabilities because the establishment is operated by one who also operates a hotel, rather than by one who furnishes only food to his customers. In either case the customer seeks only restaurant service.

“We do not mean to imply that the relationship of innkeeper and guest may not arise where a patron partakes of a single meal at a hotel. There are cases which hold that the relationship may arise in this manner. See *Burton v. Drake Hotel Co.*, 237 Ill. App. 76; *Freudenheim v. Eppley*, 3 Cir., 88 F. 2d 280. But in these cases there were other circumstances which indicated an intent to create the relationship.

“Indeed, the controlling factor in determining whether the relationship of innkeeper and guest has been established is the intent of the parties. 43 C.J.S., *Innkeepers*. § 3, subsec. b, p. 1140; 28 Am. Jur., *Innkeepers*, § 19, p. 551.

“Applying these principles to the case before us, it is clear that the allegations of the notice of motion do not show the establishment of the relation of innkeeper and guest between the parties. On the contrary, they show merely the relationship of restaurateur and patron.

“There is no allegation that the plaintiff sought or intended to seek to become a guest of the hotel, or that he, or the proprietor, or the latter’s servants or employees, did anything to indicate the intention to create such relation. There is no allegation that the plaintiff sought any of the other accommodations furnished by the establishment. On the contrary, it is clear that he sought merely to patronize the restaurant, as such. The allegation is that the defendant had entered into an ‘arrangement and agreement’ with two social clubs, under the provisions of which the defendant was to serve certain meals on certain days to the members of these clubs, including the plaintiff. It was while the plaintiff was seated at a table in the restaurant, pursuant to these arrangements, that he sought and was refused service of meals on two occasions.

“Since the notice of motion for judgment charges the defendant with the breach of no legal duty, the demurrer there to was properly sustained. The judgment is

“Affirmed.”

In *Wallace vs. Shoreham Hotel Corp.*, decided by the Municipal Court of Appeals for the District of Columbia, 49 A. (2d) 81, it is said:

“One who is merely customer at a bar, restaurant, barber shop, or newsstand, operated by hotel, does not thereby establish the relationship of innkeeper and guest.”

The historical background given by this court in the Mayflower case, establishes that under our modern way of life, the relationship of guest and innkeeper does not apply where one becomes a patron for the sole purpose of partaking of a meal.

CONCLUSION

We submit that the trial judge was correct in dismissing this case, and therefore, ask this Honorable Court to affirm the judgment of the District Court.

Respectfully submitted,

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